

**NP RED ROCK LLC d/b/a
RED ROCK CASINO, RESORT & SPA**

and

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 501, AFL-CIO**

Case No. 28-RC-230613

**EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION AND CERTIFICATION OF
REPRESENTATIVE**

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Pursuant to Section 102.67 of the National Labor Relations Board’s Rules and Regulations, NP Red Rock LLC d/b/a Red Rock Casino, Resort & Spa (“Red Rock” or “Employer”) hereby requests review of the Decision and Direction of Election (“D&DE”) issued by the Regional Director on November 20, 2018, and the Certification of Representative (“Certification”) issued by the Regional Director on December 11, 2018 (collectively, the “Decisions”).

I. INTRODUCTION

The Petitioner, International Union of Operating Engineers Local 501, AFL-CIO (“Union” or “Petitioner”), seeks to represent a unit composed of all slot technicians, utility technicians (collectively, the “Technicians”) and slot mechanics at the Employer’s facility. A core function of the Technicians’ duties is to protect the Employer’s property and assets from fraud and theft. Red Rock presented overwhelming and undisputed evidence that the Technicians enforce the Employer’s rules and policies to prevent fraudulent payouts; protect against counterfeit currency and cash-out tickets; safeguard the Employer against fraudulent claims of game malfunctions, lost credits, or failure to pay winning hands; verify game settings to ensure that payout percentages have not been intentionally or inadvertently altered; investigate and address machines that display an irregular payout pattern; and protect the Employer from tampering, advantage play, and physical and software vulnerabilities, among other duties. In short, they “enforce against employees and other persons rules to protect [the] property of the employer” and are therefore “guards” within the meaning of the Act. *See* 29 U.S.C. § 159(b)(3).

The Regional Director disregarded this undisputed evidence, focusing instead on the thoroughly discredited notion that only prototypical plant security guards who perform police-like functions – such as physically confronting guests, participating in “sting” operations, and carrying firearms – are guards under the Act. That reasoning was recently rejected by the D.C. Circuit in

Bellagio, LLC v. NLRB, 863 F.3d 839 (D.C. Cir. 2017); is inconsistent with the plain language of the Act; departs from the Board’s historic analysis; and, as pointed out in *Bellagio*, is premised on a stagnant view of the Act that fails to account for the “peculiar” realities of an “ultramodern luxury casino.” The Regional Director’s reliance on that reasoning was plain error.

Accordingly, there are compelling reasons to grant this review in that: (1) the Decisions are inconsistent with decades of Board precedent; (2) the Decisions rely on clearly erroneous and prejudicial factual determinations; and (3) the Regional Director committed prejudicial error. Alternatively, to the extent the Decisions correctly apply Board precedent – namely *Boeing Co.*, 328 N.L.R.B. 128 (1999) – that precedent is simply wrong, inconsistent with the plain language of the Act, conflicts with better-reasoned Board and federal case law, and should be overturned.

II. STATEMENT OF THE CASE

On November 6, 2018, the Union petitioned to represent a unit composed of all Technicians and slot mechanics at the Employer’s facility.¹ On November 13, 2018, the Employer filed its position statement, maintaining that the Petition must be dismissed because the Technicians are “guards” within the meaning of the Act, and therefore ineligible to be represented by the Union, which indisputably admits non-guard employees to membership. (Ex. E, Bd. Ex. 2 at 1 to Pre-Election Hearing.)² The pre-election hearing was held on November 15, 2018.

During the course of the pre-election hearing, the Employer presented extensive evidence, including the testimony of Raymond Lee, Slot Technician Manager at Red Rock, and Richard DeGuise, a former Nevada Gaming Control Board Agent, that Red Rock is targeted on a daily basis by scammers and cheats and its Technicians enforce its rules and policies in order to protect

¹ The parties stipulated that “slot mechanics” are not included in the bargaining unit. (Bd. Ex. 2 at 3.)

² All cited Board exhibits from the pre-election hearing are attached under Exhibit E.

its property and assets (*i.e.*, funds).³ For instance, the Employer presented undisputed evidence that the Technicians:

- Protect the Employer's assets from fraudulent claims of game malfunctions, lost credits, or failures to payout winning hands, which happen on a daily basis, by investigating and verifying guests' claims. The Technicians are the *only* employees on the Employer's property with technical expertise to fully investigate and verify such issues; thus, the technicians' findings and conclusions are *always* given as the basis for the supervisors' final decision. (Ex. C, Pre-Election Tr. at 14:17-17:1, 19:25-21:12, 23:9-24:7; *see also* Ex. D, Er. Exs. 1, 3 to Pre-Election Hearing.)⁴
- Maintain, investigate and verify bill validators to protect the Employer against counterfeit currency, counterfeit cash-out tickets called "EZ-Pay Vouchers", claims that the machine failed to correctly pay or credit a guest, and other attempted theft and fraud that happen on a daily basis. The Technicians are the *only* employees on the Employer's property with technical expertise to fully investigate and verify such issues; hence, the supervisors give great deference to the Technicians' findings and conclusions and are relied upon them on a near constant basis to detect and investigate potential fraud. (*Id.* at 17:2-18, 18:14-19:4, 38:7-39:21; *see also* Er. Ex. 2 to Pre-Election Hearing.)
- Protect the Employer's assets from fraudulent claims by enforcing the Employer's procedures to verify jackpots. The Technicians are the *only* employees on the Employer's property able to use Kobetron, a verification machine used to ensure certain gaming machines have not been tampered with. Indeed, the decision of the Employer on whether to payout a jackpot – anything over \$100,000 on the slot machines – *always* follows the investigation and recommendation of the Technicians. (*Id.* at 28:7-31:12, 34:5-35:12; *see also* Er. Ex. 4 to Pre-Election Hearing.)
- Review and address reports from manufactures outlining new vulnerabilities and issues with machine software; individually verify machines for vulnerabilities, fix vulnerabilities in games, and report any issues. The Technicians are the *only* employees on the Employer's property involved in verifying and fixing vulnerabilities and other issues associated with the gaming machine. (*Id.* at 35:25-38:5, 56:11-57:12; *see also* Er. Ex. 5 to Pre-Election Hearing.)

³ The Parties stipulated to admitting the transcript of Richard DeGuise testimony from NP Palace LLC and International Union of Operating Engineers Local 501, AFL-CIO pre-election hearing, 28-RC-211644 (Dec. 27, 2017), as Joint Exhibit 1, as the witness' testimony in this matter would be substantively identical to his prior testimony. (*Id.* at 7:3-14; *see also* Ex. F.)

⁴ All cited transcript pages and Employer exhibits from the pre-election hearing are attached under Exhibits C and D, respectively.

- Implement the Employer's policies to ensure that newly-purchased machines are set up correctly in all aspects; failure to properly verify the settings could expose Employer to significant gaming losses. (*Id.* at 39:22-41:11, 42:11-14.)
- Protect the Employer's assets from tampering or other advantage play by monitoring, inspecting and verifying slot machines that have higher-than-expected payout ratios. The Technicians are the *only* employees on the Employer's property with the technical expertise to fully investigate and verify such issues. (*Id.* at 42:23-44:7; *see also* Er. Ex. 6 to Pre-Election Hearing.)
- Identify and investigate mistakes or intentional misconduct by other Technicians by reviewing gaming history, verifying game settings and reporting findings to the supervisor. The Technicians are the *only* employees within the slot department who are prohibited from gambling at the Employer's properties due to their intimate knowledge on the performance of specific slot machines; failure to enforce Employer's policies against other Technicians could expose Employer to significant gaming losses. (*Id.* at 41:4-11, 47:18-48:14.)
- Are entrusted with all types of slot machine access keys, which – if used nefariously – would allow an individual to alter game outcomes and obtain access to the cash within the machine; losing their access keys will result in changing locks on all of the gaming machines on the Employer's property. (*Id.* at 44:9-25, 55:7-56:1; *see also* Er. Ex. 7 at 125, 147 to Pre-Election Hearing; Ex. F, Jt. Ex. 1 to Pre-Election Hearing at 68:4-14.)⁵
- Enforce the Employer's rules and policies against underage gaming, which protects the Employer against both legal liability and the potential loss of its gaming license. Unlike security guards who patrol the outside perimeter of the gaming floor, the Technicians work directly with the gaming machines on the gaming floor, and thus, are the frontline to be alert for any suspicious activities, including underage gaming. (Pre-Election Tr. at 45:14-46:25; *see also* Er. Ex. 7 at 138.)
- Enforce the Employer's rules and policies against underage drinking by directly checking the guests' photo IDs, or escalating the matter to their supervisor or security as necessary. (*Id.* at 47:1-6; *see also* Er. Ex. 7 at 138.)
- Monitor the casino floor for banned or otherwise unauthorized guests or team members and for any suspicious activities to prevent fraudulent or illegal transactions. (*Id.* at 47:7-17, 56:2-10; *see also* Er. Ex. 7 at 137.)
- Enforce the same rules and policies against Employer's other employees to protect Employer's assets by verifying jackpots, investigating claims of improper payouts or lost credits and other fraudulent claims. (*Id.* at 50:16-51:3.)

⁵ All cited transcript pages from Joint Exhibit 1 from the pre-election hearing are attached under Exhibit F.

- Enforce the Employer’s rules and policies against theft, vandalism and damages to Employer’s property. (*Id.* at 74:16-75:24.)
- Play an integral and indispensable role in assisting the Nevada Gaming Control Board to investigate gaming irregularities and disputes – indeed, without the Technicians, the Nevada Gaming Control Board *cannot* investigate and resolve the disputes and issues. (*Id.* at 45:1-10; Jt. Ex. 1 to Pre-Election Hearing at 69:23-70:6, 71:2-73:8.)
- Play a critical role in assisting the Nevada Gaming Control Board by forming probable cause to effect an arrest when guests are detained for engaging in attempted theft or fraud. (*Id.* at 65:10-14, 73:9-74:6.)

Despite this overwhelming evidence, on November 20, 2018, the Regional Director issued the D&DE and rejected the Employer’s contention that the petitioned-for unit was comprised of guards. (Ex. A.) The election was held on November 29, 2018, and the Petitioner received a majority of the valid votes cast. On December 11, 2018, the Regional Director certified the Union as the exclusive representative of the petitioned-for unit. (Ex. B.)

III. THE TECHNICIANS ARE STATUTORY “GUARDS”

Section 9(b)(3) of the Act defines a guard as a person employed to “**enforce against employees and other persons rules to protect [the] property of the employer** or to protect the safety of persons on the employer’s premises” U.S.C. § 159(b)(3) (emphasis added).

For decades, consistent with the plain language of the statute, the Board has repeatedly held that the definition of “guard” is not limited to notions of a prototypical plant security guard, but includes employees who more broadly enforce rules against employees or patrons to protect the Employer’s property or assets. For instance, in *A.W. Schlesinger Geriatric Ctr., Inc.*, 267 N.L.R.B. 1363 (1983), the Board considered the “guard” status of two maintenance employees who walked the employer’s premises and – in addition to their maintenance duties – were authorized to ask that a trespasser or other employee cease creating a disturbance or that the unauthorized person leave. The Board found that, “although the maintenance employees have no special training as guards and do not wear guard uniforms or carry firearms, we conclude that the

two night and weekend maintenance employees are employed for security purposes in addition to their maintenance duties.” *Id.* at 1364. Significantly, the Board found that the maintenance employees were responsible for keeping unauthorized persons off the premises, even though they had been instructed to contact a supervisor or law enforcement officer first and to avoid confrontation if possible. The Board concluded that it was “sufficient that they possess and exercise responsibility to observe and report infractions, as this is *an essential step in the procedure for enforcement of the [employer’s] rules.*” *Id.* Further, the Board found it “not determinative that [these duties were] not their only function.” *Id.*; *see, e.g., Rhode Island Hosp.*, 313 N.L.R.B. 343, 346-47 (1993) (finding that shuttle van drivers were “guards”; “[A]lthough one of their primary duties is to transport employees from building to building, they are also charged with the responsibility of being on the lookout for and reporting security problems or rules violations.”); *MGM Grand Hotel*, 274 N.L.R.B. 139, 1398-40 (1985) (fire alarm and security system operators fell within statutory definition of “guard” even where sole duties were to observe and report); *Am. Dist. Tel. Co.*, 160 N.L.R.B. 1130, 1136 (1966) (“guard” status is not limited to employees who enforce rules against other employees); *McDonnell Aircraft Co. v. NLRB*, 827 F.2d 324, 326-27 (8th Cir. 1987) (to qualify as a “guard” the performance of guard duties need not be the employee’s only function, and collecting cases holding that “unarmed courier service drivers,” “fitting room checkers,” “armored car guards,” and “receptionists, fire patrolmen, chauffeurs and investigators” were “guards” under the Act); *see also Waltherboro Mfg. Corp.*, 106 NLRB 1383, 1384 (1953) (“It is the nature of the duties of guards and not the percentage of time which they spend in such duties which is controlling.”).

Similarly, that the Technicians do not themselves personally confront individuals or resolve instances of misconduct is not dispositive in determining guard status. In *Wright Mem’l*

Hosp., 255 N.L.R.B. 1319, 1320 (1980), the Board concluded that ambulance drivers who were “on the lookout for fire, theft, vandalism, and unauthorized personnel” were guards under the Act even though the drivers, upon discovering an irregularity or violation, took “no action on their own” but instead informed a department head who would then take action. The Board reasoned that it was sufficient that the drivers had “responsibility to observe and report infractions,” an “essential step in the procedure for enforcement of [the employer’s] rules,” and that it was “immaterial” that the drivers did not themselves enforce the employer’s rules. *See also Local 3, Int’l Bhd. of Elec. Workers v. NLRB*, 1987 WL 14923 at *1 (S.D.N.Y. Jul. 22, 1987) (electronic technicians were guards within the meaning of the Act where they monitored the fire management system and notified the appropriate authorities in the event of a problem); *compare Tac/Temps & Phila. Coca-Cola Bottling Co.*, 314 N.L.R.B. 1142, 1143 (1994) (checkers who simply reported discrepancies in product count to management were not “guards” because they did not actually investigate whether theft occurred or enforce specific rules concerning theft).

In *Boeing Co.*, 328 N.L.R.B. 128 (1999), the Board departed from this precedent, holding that “guard responsibilities include [only] those typically associated with traditional police and plant security functions,” such as weapons training and possession, participation in security rounds or patrols, wearing “guard-type” uniforms or displaying other indicia of guard status, and having authority to “compel” compliance with the employer’s rules. *Id.* at 130. As pointed out by Member Brame in his dissent, the Board’s new formulation of the test for “guard” status was inconsistent with the plain text of the statute, the Eighth Circuit’s decision in *McDonnell Aircraft*, and historic Board precedent. *Id.* at 133-34 (Brame, dissenting). Indeed, the case upon which *Boeing* relied for most of its analysis – *Burns Sec. Servs.*, 300 N.L.R.B. 298 (1990) – had been set aside by the Eighth Circuit in *BPS Guard Servs., Inc. v. NLRB*, 942 F.2d 519 (8th Cir. 1991) before

Boeing was even issued. Put simply, *Boeing*'s holding that only persons who perform "traditional" police-like functions are guards is poorly reasoned, inconsistent with the plain language of the statute and Board precedent, and has been repeatedly rejected by the federal appellate courts.⁶

Indeed, the D.C. Circuit's recent decision in *Bellagio, LLC v. NLRB*, 863 F.3d 839, 848-49 (D.C. Cir. 2017), again rejected the Board's narrow definition of "guard" and found – consistent with the Board's historic view – that a casino's surveillance technicians were "guards" under Section 9(b)(3) of the Act. The D.C. Circuit expressly rejected the Board's argument that the technicians could not be guards simply because they "made no rounds," and did not carry out functions akin to traditional plant security guards (*i.e.*, they did not confront guests, carried no weapons, and did not wear security uniforms or badges) on the basis that there is no statutory requirement whatsoever that a guard must personally confront other individuals. *See id.* The D.C. Circuit affirmed that it is sufficient that the casino's technicians play an integral role in effectuating the employer's rules and policies and that their lack of direct contact with the wrongdoers did "not detract from their guard status." *Id.* at 849 (quoting *A.W. Schlesinger Geriatric Ctr., Inc.*, 267 N.L.R.B. at 1364). Notably, the fact that the technicians acted at the direction of human resources and other supervisory personnel and that their duties to report suspicious activities were shared by all other casino employees did not limit the Court from finding the technicians to be "guards" within the meaning of the Act. The Court's ruling considered key factors not given due weight by the Board, such as the technicians' duties in deterring, detecting, reporting, and investigating suspicious activity, the modern context in which their enforcement took place, their role in preventing and investigating misconduct by other employees, and their role in protecting the Employer's valuable assets generally. *Id.* at 849-52. In particular, the Board failed to give due

⁶ The Board has repeatedly overruled poorly-reasoned precedent when necessary to return to well-established doctrine with a sound basis in the Act. *See, e.g., Hy-Brand Indus. Contractors*, 365 N.L.R.B. No. 156 (2017).

weight to the “peculiar” context of an “ultramodern luxury casino” and the “technological advance[s]” in hotel-casino security. *Id.* at 850-51. In short, the D.C. Circuit implicitly rejected the Board’s approach in *Boeing* and concluded that, because the evidence, taken as a whole, demonstrated that surveillance technicians “perform an essential step in the enforcement of rules to protect the casino’s property and patrons, including enforcement against their fellow employees” they were guards within the meaning of the Act, notwithstanding their lack of “traditional” guard duties. *Id.* at 849.

Here, the Regional Director committed the same errors as the Board in *Bellagio*. First, the Regional Director acknowledged that “the Employer would not be able to detect certain kinds of fraud without the work performed on its machines by its Technicians” and “due to their intimate knowledge of the gaming systems, Technicians are prohibited from gambling at the Employer’s facility, whereas all other employees of at Employer are permitted to gamble at its facility.” (Ex. A.) Nevertheless, the Regional Director disregarded the overwhelming and undisputed evidence that a core function of the Technicians’ duties is to enforce rules against casino guests and other third-parties to protect the Employer’s property and assets, specifically those associated with the gaming machines. Instead, it focused exclusively on whether the Technician’s perform “traditional” security functions, such as physically confronting guests. For example, in rejecting the Employer’s contention that the petitioned-for unit was composed of guards, the Regional Director acknowledged that the Technicians, on a daily basis, play an essential role in detecting, investigating and reporting fraud with respect to gaming machines on the Employer’s property and in verifying jackpots against fraudulent payouts that “could lead to financial losses for the Employer,” but nonetheless held that “any guard-like responsibilities conferred on Technicians are...a minor and incidental part of their primary responsibility of providing services to guests

gambling on the Employer’s gaming machines...the Technicians do not confront people but are instead expected to report to the Employer.” (*Id.*) The Regional Director glossed over the fact that the Technicians’ reporting functions are reflective of, rather than distinct from, the essential responsibilities of the disputed employees. Likewise, the Regional Director focused on the fact that the Technicians are not interchangeable with the Employer’s more traditional security officers – ignoring that the technicians in *Bellagio* (as well as the ambulance drivers, fitting room checkers, chauffeurs, firemen, and maintenance employees in the cases discussed above) were also not interchangeable with traditional police-like security officers. Most critically, the Regional Director focused on superficial factual distinctions between this case and *Bellagio* – such as that the Technicians are not involved in “sting” operations or that they are not permitted to enter surveillance rooms – but missed the actual point of *Bellagio*: that the statutory definition of “guard” encompasses more than prototypical security officers.⁷

Likewise, the Regional Director failed to consider the context of an “ultramodern luxury casino.” Red Rock is a modern luxury hotel-casino that generates significant revenues from its 2,800 gaming machines, which include not only traditional reel machines, but also video slot, video poker and other electronic gaming machines. (Pre-Election Tr. at 13:1-10.) As explained by the Employer’s witnesses, the modern slot machines rely on complex computer algorithms and software rather than mechanical reels, locks and solenoids, and the risk of guests tampering with the gaming machines’ security features is even greater. (*Id.* at 13:17-14:13.) Thus, with the evolution from mechanical to electronic slot machines, the role of the Technicians is no longer that of a mechanical repairman. (*Id.*) Nor is the primary risk to the Employer’s assets that a casino

⁷ Demonstrating the meaninglessness of the criteria relied upon by the Regional Director, the evidence at the hearing established that the security guards are also prohibited from entering freely into the surveillance room. (Pre-Election Tr. at 65:21-67:9, 77:8-24.) .

patron will physically smash a slot machine and flee with a can of quarters. Rather, in the modern context, the danger is unscrupulous individuals who try to take advantage of all aspects of the Employer's slot machine operation, ranging from the initial bill validation, to fraudulent payouts and tampering, to claims of lost credits, to fraudulent cash-out tickets. *See Bellagio*, 863 F.3d at 842, 850-51. Put simply, the evolving nature of the contemporary casino *requires* the Board to consider this context in determining what constitutes a "guard" under the Act. *See, e.g., MGM Grand Hotel*, 274 NLRB at 140 & nn.8-9 (Board distinguishing itself from prior Board decisions where "technological advance" in security systems was not contemplated in determining employees' guard status). Failing to apply the 9(b)(3) on the facts in this case would be an affirmation of the antiquated views that the Board has consistently refused to enforce in other contexts.⁸

The undisputed evidence is that the Technicians' direct responsibility to protect the Employer's property from such fraud and theft is an essential step in enforcing the Employer's rules and policies. In particular, the Technicians' power to exercise a significant influence over decisions concerning the slot machine operations due to their unique "know-how" and access to the thousands of gaming machines on the property – making up the majority of all gaming activity – makes these Technicians an integral part of the Employer's efforts to safeguard its property and assets. The text of the statute does not distinguish among "rules," differentiating enforcement of general security rules from rules ensuring security of gaming machines. Rather, all rules pertaining to the protection of the employer's property on the employer's premises are included within the provision's scope. Thus, because they play a special role in enforcing the Employer's rules against

⁸ The Board has consistently recognized that application of the Act in the modern economy requires certain Board policies and doctrines to be reconsidered. *See, e.g., Purple Commc 'ns.*, 361 N.L.R.B. No. 126 (2014).

“other persons” to protect the Employer’s “property” and assets relating to slot machines, they are “guards” within the meaning of the Act.

IV. CONCLUSION

For the reasons set forth above, the Decisions should be set aside and the Petition should be dismissed.

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CERTIFICATE OF SERVICE

I hereby certify this 21st day of December, 2018, that a copy of the Employer's Request for Review of the Regional Director's Decision and Direction of Election and Certification of Representative, including Exhibits, was electronically served on:

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